United States of America
Before the National Labor Relations Board

WAYNE/SCOTT FETZER COMPANY d/b/a WAYNE COMBUSTION, SYSTEMS, Employer, and MATTHEW PASSWATER, Petitioner, and UNITED STEEL, PAPER AND FORESTRY, RUBBERM MANUFACTURING, ENERGY, ALLIED INDUSTRIALAND SERVICE WORKERS INTERNATIONAL UNION, and its LOCAL 937, Union.	)	Case 25-RD-256161

UNION'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

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I. INTRODUCTION

Pursuant to Section 102.67(f) of the National Labor Relations Board's Rules and Regulations, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("Union") submits this Opposition to Wayne Combustion System's ("Employer") Request for Review of the Regional Director's Decision on Objections and Certification of Representative. The Employer makes four arguments in support of its Request for Review, each of which is meritless. First, the Employer urges the Board to revisit its critical-period doctrine. But the Employer already asked the Board to review the Regional Director's decision to exclude pre-petition allegations from the hearing in its first request for review. The Board declined. The Employer cannot relitigate this issue by filing a second request for review. Further, the Regional Director's decision to exclude certain objections was based on the Employer's insufficient offers of proof, not solely on the fact that this alleged conduct occurred outside of the critical period. Second, the Employer attacks the Hearing Officer's credibility determinations but does not present any evidence that would warrant overturning those carefully considered findings. Third, the Employer faults the Hearing Officer and the Regional Director for misapplying the *Taylor Wharton*[1] analysis because they failed to assess the cumulative impact or dissemination of incidents that were either excluded from the hearing or that they determined did not happen. This argument is non-sensical. Fourth, the Employer argues that employee Tyler Adams was ineligible to vote because he resigned after casting his ballot. The Hearing Officer and Regional Director correctly found that the Employer cannot file a post-election challenge, and that Adams was employed during the eligibility period and on the date of the election and therefore eligible to vote. The Board should deny the Employer's Request for Review as the Employer fails to establish that the Hearing Officer or the

[1] *Taylor Wharton Div.*, 336 NLRB 157, 158 (2001).

Regional Director departed from Board precedent, made erroneous factual determinations, or that there are compelling reasons to revisit Board precedent.

II. PROCEDURAL BACKGROUND

The Union represents a unit of 35 production and maintenance employees at the Employer's Fort Wayne, Indiana facility. On February 11, 2020,[2] Petitioner Matthew Passwater filed a petition to decertify this unit. Bd. Ex. 1(b)[3]. Region 25 of the NLRB conducted a decertification election on March 5. *Id.* The Union won the election, with 18 bargaining-unit employees voting to continue representation and 17 voting against. Er. Ex. 6; RD Decision at 1. On March 12, the Employer filed three objections, which it supported by nine offers of proof. Bd. Ex. 1(a); 1(b). It is worth laying out in some detail the procedural history of the Employer's objections. In its Request for Review, the Employer repeatedly attempts to revive offers of proof that both the Regional Director *and* the Board have already rejected.

The Regional Director directed a hearing on the following five offers of proof:

- On unspecified dates during the critical period after the petition was filed and prior to the election, Union President Melissa Waldren confronted and interrogated employees who had signed the petition;
- On an unspecified date during the critical period after the petition was filed and prior to the election, Union Steward Jeana Ellis told an employee that she would punch another employee in the face if the Union got voted out;
- On or about February 13, 2020, Ellis approached an employee and pushed two fingers into the side of their cheek;

[2] All dates are in 2020 unless otherwise noted.

[3] The Union uses the following abbreviated citations: "Bd. Ex. __" refers to the Board's exhibits introduced at the beginning of the hearing; "Er. Ex. __" refers to the Employer's exhibits introduced at the hearing; "RD Decision __" refers to the Regional Director's Decision on Objections and Certification of Representative; "Hr. Off. Rep. __" refers to the Hearing Officer's Report on Objections; "Er. Req. for Review __" refers to the Employer's Request for Review of the Regional Director's Decision on Objections and Certification of Representative; "Tr. __" for the Hearing Transcript; and "Er. Post-Hearing Br. __" for the Employer's Post-Hearing Brief.

- On an unspecified date during the critical period after the petition was filed and prior to the election, Ellis followed an employee into the restroom, slammed a stall door, and called the employee a "bitch;" and

- On or about March 5, 2020, Ellis approached an employee, put a finger in their face, and demanded several times, "You better vote." Ellis also called an employee who opposed the Union a "bitch" and stated that she had "better not vote."

Bd. Ex. 1(b). She also directed an election on an independent objection regarding the eligibility of Tyler Adams, a voter who resigned after casting his vote. *Id.*

The Regional Director determined that the remaining four offers of proof would not warrant setting aside the results of the election if they were set for a hearing. These rejected offers of proof and the Regional Director's reasoning are set forth below in full:

- On an unspecified date prior to the filing of the petition on February 11, 2020, Ellis aggressively confronted and interrogated employees about a rumor that employees were considering circulating a petition to have the Union removed. The Employer's offer of proof on this matter relates to pre-petition conduct, which is outside the scope of its objections, and further merely provides its own conclusions as to the impactful nature of the incident without sufficiently describing the alleged misconduct by the Union agent. The offer of proof does not describe the substance, manner, or circumstances of the alleged confrontation or interrogation. The offer of proof on this matter, viewed objectively in the minimal context provided, fails to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.

- On an unspecified date prior to the filing of the petition on February 11, 2020, an employee overheard Union Steward Mike Labarbera state, in reference to employees who were considering circulating a petition to remove the Union, "That scab, I'd like to take a bat to [their] head." The Employer's offer of proof on this matter relates to pre-petition conduct, which is outside the scope of its objections, and further fails to sufficiently describe the event to warrant setting it for hearing. To that end, the offer of proof does not identify to whom Labarbera was speaking, how the witness came to hear the alleged statement, where the incident took place, nor any other context of the purported statement.

- On March 5, 2020, Ellis asked an employee "So, how long were your kids in foster care." Immediately after this comment was made, Waldren approached a different employee in the area and walked to the voting area with them in order to interfere with the employees' plans to walk to the polling place together. The Employer further offered a witness to testify to the fact that they saw Waldren speaking with the same employee while "cornered" by the time clock. Although the Employer makes a number of conclusionary statements about the assumed intent and perceived impact of these purportedly related

events, the Employer's offer of proof fails to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.

- Around February 28, 2020, Ellis sent to another employee hostile text messages which disavowed their friendship and then, when Ellis inadvertently called that employee thereafter, was overheard saying "I got this bitch I'm dealing with. I'm going to kick her ass." The offer of proof fails to describe the alleged hostile language or circumstances of the text messages or to otherwise show there was any relationship of the text messages to the decertification petition or union support. Similarly, the offer of proof fails to describe any evidence that the Employer plans to introduce which would connect the alleged threat during the unintentional phone call to the decertification petition or union support.

Id.

After the Regional Director directed a hearing on some, but not all, of the Employer's objections, the Employer filed a Request for Review with the Board ("First Request"). Bd. Ex. 1(d). In its First Request, the Employer argued at length that the Board should consider the Union's alleged pre-petition conduct. *Id.* at 3, 6-8. The Employer also argued that the Regional Director improperly analyzed each offer of proof in isolation, rather than considering the cumulative effect of the alleged misconduct. *Id.* at 3, 10. The Board rejected these arguments and determined that the First Request did not raise issues warranting review. Bd. Ex. 1(e).

Following the Board's denial of the Employer's First Request, the parties held a virtual two-day hearing on the Employer's remaining objections. The Hearing Officer recommended that the Regional Director overrule the Employer's objections because the Employer did not present sufficient evidence to establish that the Union engaged in objectionable conduct. Hr. Off. Rep. at 2. The Employer filed exceptions to the Hearing Officer's Report, arguing that "the Hearing Officer erred in virtually all of his findings and recommendations because they were unsupported by substantial or credible record evidence and were contrary to law." RD Decision at 2. Specifically, the Employer argued that the Hearing Officer made erroneous credibility determinations, improperly applied the *Taylor Wharton* analysis, failed to consider pre-petition

conduct, failed to consider other allegations and theories raised for the first time at the hearing, and incorrectly determined that an employee was eligible to vote. After considering the Employer's exceptions, the Regional Director affirmed the Hearing Officer's findings and issued a certification of representation. A summary of the Hearing Officer and Regional Director's reasoning is set forth below.

- On unspecified dates during the critical period after the petition was filed and prior to the election, Union President Melissa Waldren confronted and interrogated employees who had signed the petition.

The Hearing Officer considered evidence that both Waldren and Union Steward Jeana Ellis engaged in this conduct. The Hearing Officer found that Ellis asked employee Robin Davis if she knew what she was doing when she signed the petition. The Hearing Officer also found that later that day, Waldren told Davis, "I thought you told me that you weren't going to sign the petition." The Hearing Officer analyzed these statements under the *Taylor Wharton* test and determined that these minor, isolated statements did not warrant setting aside the results of the election. Hr. Off. Rep. at 6-8. The Regional Director then considered the Employer's argument that the Hearing Officer failed to consider the effect of these statements cumulatively with additional alleged misconduct. The Regional Director noted that with one exception, the additional alleged misconduct either occurred during the pre-petition period or was otherwise not encompassed in her Order Directing a Hearing. She considered the two statements in conjunction with an additional statement that Ellis made to Davis in the restroom, and found that the three statements did not interfere with the results of the election. The Regional Director explained that the three isolated statements were made to a single employee, that the cases cited by the Employer were readily distinguishable, and that there was no direct credible evidence that the statements were disseminated in the bargaining unit. RD Decision at 5-6.

- On an unspecified date during the critical period after the petition was filed and prior to the election, Union Steward Jeana Ellis told an employee that she would punch another employee in the face if the Union got voted out.

The Hearing Officer considered Davis's testimony that Ellis told her she would punch Petitioner Matthew Passwater in the face. Based on Davis's evasive demeanor and the Employer's failure to call witnesses to corroborate her testimony, the Hearing Officer did not credit Davis and recommended that the Regional Director dismiss this objection. Hr. Off. Rep. at 9-10. The Regional Director found no basis for overruling the Hearing Officer's credibility determination. RD Decision at 3.

- On or about February 13, 2020, Ellis approached an employee and pushed two fingers into the side of their cheek.

The Hearing Officer noted that the Employer provided no evidence in support of this objection and recommended that it be overruled. Hr. Off. Rep. at 10. The Employer did not file an exception to this finding.

- On an unspecified date during the critical period after the petition was filed and prior to the election, Ellis followed an employee into the restroom, slammed a stall door, and called the employee a "bitch."

The Hearing Officer considered evidence about two restroom incidents: one concerning Davis and one concerning employee Glenda White. The Hearing Officer credited Davis, noting that Ellis did not deny Davis's testimony. The Hearing Officer found that while Davis and Ellis were in the restroom, Davis criticized Ellis's behavior in an earlier meeting. Ellis responded that it was called freedom of speech and that she could say what she wanted because she was in the Union. Ellis then called Davis a bitch. The Hearing Officer analyzed this interaction under the *Taylor Wharton* framework, noting that the Board generally does not find name calling objectionable, that this incident would not cause fear among the employees, and that there was no evidence that this incident had been disseminated throughout the unit. Therefore, the Hearing Officer

recommended that the Regional Director overrule this objection. The Hearing Officer also recommended that the Regional Director dismiss the objection based on White's testimony. The Hearing Officer found this testimony to be embellished and not credible, due to White's demeanor, the incongruity of her testimony, and the failure of the Employer's witnesses to corroborate White. Hr. Off. Rep. at 11-13.

The Regional Director found no basis for overruling the Hearing Officer's credibility determination with respect to White's testimony. RD Decision at 3. With respect to the incident with Davis, the Regional Director found that Davis initiated the exchange in the restroom, that neither employee mentioned the petition or the election, that the Board does not generally find name calling objectionable, that the incident was isolated, and that there was no direct credible evidence that other employees were aware of this exchange. Therefore, the Regional Director affirmed the finding of the Hearing Officer. *Id.* at 5-6.

- On or about March 5, 2020, Ellis approached an employee, put a finger in their face, and demanded several times, "You better vote." Ellis also called an employee who opposed the Union a "bitch" and stated that she had "better not vote."

The Hearing Officer considered White's testimony that she observed Ellis confronting employee Allen Richardson in the cafeteria. He did not credit her testimony due to her demeanor, inconsistencies in her testimony, the failure of the Employer's witness to corroborate White, and the Employer's failure to call a witness who would have credited White. Therefore, he recommended that the Regional Director dismiss this objection. Hr. Off. Rep. at 13-15. The Regional Director found no basis for overturning the Hearing Officer's credibility determination. RD Decision at 3.

The Employer also filed an objection alleging that employee Tyler Adams cast a vote and

then resigned while the polls were still open. Bd. Ex. 1(b) at B. The Hearing Officer applied well-established precedent and found that the Employer could not challenge Adams's eligibility through an objection. The Hearing Officer also found that Adams was an eligible voter and recommended that the Regional Director overrule this objection. Hr. Off. Rep. at 15-16. The Regional Director agreed that the Employer could not file a post-election challenge. The Regional Director also agreed that Adams was employed on the date of the election and was therefore an eligible voter.

After the Regional Director issued her decision, the Employer filed its second Request for Review with the Board.

III. ARGUMENT

The Board should deny the Employer's second Request for Review. The Employer makes four arguments in support of its Request, each of which is meritless: 1) the Board should revisit its longstanding precedent regarding alleged pre-petition conduct; 2) the Board should overturn the Hearing Officer's credibility determinations; 3) the Board should find that the Hearing Officer and the Regional Director misapplied the *Taylor Wharton* test by failing to consider pre-petition conduct, allegations that were not encompassed in the Regional Director's Order Directing a Hearing, or unsubstantiated hearsay testimony; and 4) the Board should find that Tyler Adams, who was employed at the time he cast his ballot, was ineligible to vote. The Union will address each of these arguments below.

First, the Union must address the Employer's false claim that "[t]here is no dispute that the various incidents of objectionable misconduct committed by the Union's agents occurred within a truncated 2 ½ week window prior to the election on March 5, 2020." Er. Req. for Review at 2. In fact, it was very much in dispute whether the Union committed any objectionable

misconduct at all, hence the October 23 and 27 hearing. Similarly, the Employer claims that "[t]here is no factual dispute that Union agents Melissa Waldren and Jeana Ellis (as well as Mike Labarbera) engaged in collective misconduct that threatened, surveilled and sought to intimidate those whom they believed did not support the Union." *Id.* at 4. Again, the Union disputes this claim in its entirety, which was the whole point of the October 23 and 27 hearing.

A. The Board should reject, for a second time, the Employer's argument that the Board consider objections based on pre-petition alleged misconduct.

The Employer argues that the Hearing Officer and Regional Director erred in discounting two alleged pre-petition incidents. First, the Employer claims that Passwater spoke with fellow employee Jason Sundquist about circulating a decertification petition. The Employer then claims that Passwater overheard Union Steward Mike Labarbera tell another bargaining-unit employee that Sundquist needed to be "cracked in the skull with a bat." Er. Req. for Review at 7-8. Second, the Employer claims that Ellis "confronted" Passwater about the petition. *Id.* at 9. The Employer urges the Board to overturn *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961), and consider allegations of objectionable conduct that occur pre-petition.

The Employer's request must be denied on procedural grounds. The Employer *already* asked the Board to consider both of these allegations in its First Request for Review, after the Regional Director applied existing law and declined to set either of them for a hearing. Section 102.67(i) of the Board's Rules and Regulations provides, in relevant part: "A party may not, however, file more than one request for review of a particular action or decision by the Regional Director. ***Repetitive requests will not be considered.***" The Employer took the opportunity before the hearing to request review of the Regional Director's decision to exclude pre-petition conduct, arguing at length that "such patent misconduct cannot rationally be shielded by the coincidence that occurred a few days before a decertification petition is filed." Bd. Ex. 1(d) at 8. The Board

rejected the Employer's argument. In accordance with the Regional Director and the Board's orders, the Hearing Officer did not permit the Employer to introduce direct evidence about the Labarbera allegation, although he did allow the Employer to submit an offer of proof. (The Hearing Officer did permit the Employer to introduce evidence about the alleged Ellis-Passwater confrontation.) The Employer now attempts to take a second bite at the apple by asking the Board to review the Hearing Officer's decision to adhere to the Regional Director and the Board's orders and discount these two pre-petition allegations. The Board's Rules and Regulations rightly prohibit this kind of repetitive litigation of the same issue. Otherwise, dissatisfied parties could request review of the same decision pre- and post-hearing, which would misuse the Board's resources.

Even if the Employer could request review of the same issue pre- and post-hearing, *Ideal Electric* and its progeny should not be overturned. As the Board has noted, it "focuses on this [critical] time period because the probability that coercion or other improper influence will affect employees' choice is then at its highest, thus, justifying special scrutiny of employer and union actions, while at the same time avoiding litigation over matters remote in time from the election." *Stericycle, Inc.*, 357 NLRB 582, 584 (2011) (citing *NLRB v. Wis-Pak Foods*, 125 F.3d 518, 521 (7th Cir. 1997); *Nat. League of Professional Baseball Clubs*, 330 NLRB 670, 676 (2000)). This focus makes sense. Both certification and decertification campaigns can last a long time. Without the critical-period doctrine, parties would file objections based on conduct occurring well before a petition was filed. The Board would then be required to adjudicate multiple and varied objections occurring throughout a potentially long timeline. Current precedent, in contrast, provides clear guidelines to parties seeking to object to pre-election conduct and avoids expansive litigation.

Further, the Board's critical-period doctrine does not prevent parties from raising pre-petition conduct. For example, the Board has long considered pre-petition conduct when that conduct "adds meaning and dimension to related postpetition conduct." *Dresser Industries, Inc.*, 242 NLRB 74, 74 (1979). The Board will also consider pre-petition conduct when "clearly proscribed activity [is] likely to have a significant impact on the election." *Royal Packaging Corp.*, 284 NLRB 317, 317 (1987). *See also Harborside Healthcare, Inc.*, 343 NLRB (2004) (reaffirming *Ideal Electric* and setting aside election due to supervisor's pre-petition solicitation of union cards); *Lyon's Restaurants*, 234 NLRB 178 (1978) (setting aside election based on union's pre-petition statement that employees had to join the union or would not work) *Gibson's Discount Center*, 214 NLRB 221 (1974) (setting aside election based on union's pre-petition offer to waive initiation fees). Therefore, the Board's current doctrine strikes an appropriate balance between bright line guidance and flexibility to consider relevant or egregious pre-petition conduct.

If the Board is inclined to revisit its critical-period doctrine, this is not an appropriate case to overturn that sixty-year precedent. The Regional Director did not exclude the two offers of proof at issue simply because the Employer claimed they occurred pre-petition. Rather, the Regional Director based her decision on the Employer's reliance on conclusionary statements and failure to provide relevant context. Regarding the Labarbera allegation, the Regional Director found that the Employer's offer of proof failed to "sufficiently describe the event to warrant setting it for a hearing" because the Employer did not provide any relevant context. Bd. Ex. 1(b) at C(g). Regarding the Ellis allegation, the Regional Director found that the Employer provided "its own conclusions as to the impactful nature of the incident without sufficiently describing the alleged misconduct by the Union Agent." *Id.* at C(f). Again, the Employer failed

to provide any relevant context that would warrant setting the offer of proof for a hearing. In sum, the Regional Director's decision was only partially based on the fact that the two offers of proof allegedly occurred pre-petition. More importantly, the Employer did not meet its burden of providing evidence or a description of evidence that would warrant setting aside the election if the evidence was credited at a hearing. *Id.* at C (citing *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip op. 1, fn. 2 (2017); *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010)).

If the Board does decide to revisit *Ideal Electric* through this case, the appropriate remedy is not to "reverse the Decision and order a re-run election," as the Employer urges. Er. Req. for Review at 17. If the Board exhausts the procedure in Section 102.67(g) of its Rules and Regulations, decides to apply a new standard, and decides to apply that standard retroactively to this case, the Board should not immediately order a rerun election. First, the record does not include any evidence regarding the Labarbera allegation; it only includes the Employer's offer of proof. Therefore, a remand, not a rerun, would be necessary to allow both parties to introduce evidence and to allow the Hearing Officer to determine whether this offer of proof warranted setting aside the results of the election. Second, the Ellis-Passwater incident (which the Hearing Officer did consider) is not objectionable. Passwater testified that Ellis said she knew he and another employee had a petition going around and asked Passwater what "they" had offered him to file the petition. Tr. at 194: 17-22. Passwater testified that he thought it was "ballsy" of Ellis to ask him this question but clarified that he was not scared or intimidated. *Id.* at 194: 25; 217: 18-22. According to Passwater, that was the extent of the interaction. Despite the Employer's attempt to frame this interaction as "ominous," merely asking a co-worker about a petition is not objectionable. See *Int'l Bhd. of Teamsters, Local 705*, 347 NLRB 428, 443 (2006) (finding no

objectionable conduct when union steward asked employee who was circulating a decertification petition what she was doing and picked up the petition and read the names).

Finally, the Employer appears to argue that the Hearing Officer erred in discounting pre-petition evidence that "someone was able to find [the petition] and see who signed it before it was filed." Er. Req. for Review at 16. If the Employer is attempting to revive its argument that the Union impermissibly created an "impression of surveillance," this argument must be rejected. *See* Er. Post-Hearing Br. at 24. The Employer did not file an objection based on this theory and cannot raise it after the deadline for filing objections has passed. *Santa Fe Hotel and Casino*, 318 NLRB 829, 829 fn. 3 (1995) (upholding ALJ's determination that objection based on posting of an employee voter list was untimely when employer only timely filed an objection based on improper electioneering); *Keeler Brass Co.*, 301 NLRB 769, 774 fn. 6 (1991) (noting Board cases that hold that "the 7-day time limit for filing objections set by this Rule [102.69(a)] should be strictly enforced"); *K. Van Bourgondien & Sons*, 294 NLRB 268, 269 (1989) (upholding Regional Director in rejecting union's objection based on additional unlawful wage increases even though the evidence was related to a timely objection alleging an unlawful wage increase because "it was not timely presented"); *Iowa Lamb Corp.*, 275 NLRB 185, 185 (1985) (overturning hearing officer's determination on allegedly objectionable statement that petitioner never alleged was objectionable); *Burns Int'l Security Services, Inc.*, 256 NLRB 959 (1982) (rejecting objecting party's untimely filed supplemental objections because "[e]ntertainment of a whole new set of objections . . . would vitiate our requirement that parties file timely objections).

Still, the Hearing Officer did consider the Employer's evidence related to this wholly new theory, which the Employer presented for the first time at the hearing. The Employer's evidence consisted of Passwater's testimony regarding his unfounded theory that the Union snuck into the

room where he kept the petition and looked at the names. Tr. at 201: 6-25; 202: 1-25; 204: 1-6. This testimony was entirely speculative. In fact, Passwater himself acknowledged that "the word got out" about the petition and there was "an immediate divide" between the employees. *Id.* at 191: 2-5. Passwater also pointed out that Ellis and employee Allen Richardson had a relationship, that Richardson signed the petition, and that Richardson might have told Ellis who signed the petition. *Id.* at 211: 14-23. (Ellis later confirmed that Richardson, among other employees, told her who signed the petition and that "it was no secret." (*Id.* at 382: 5-15; 383: 10-12)). The Employer also relied on Davis and Passwater's testimony that employees told them they were concerned that the Union knew who had signed the petition. *Id.* at 118: 25; 118: 1-3; 209: 1-4. As the Hearing Officer correctly found, and as explained in more detail below, this testimony was vague and unsubstantiated hearsay. Hr. Off. Rep. at 7, fn. 8. In short, the Employer did not establish that anyone in the Union found the petition or surveilled employees. Rather, the evidence confirms that the identities of the signatories of the petition was widely known.

B. The Employer failed to meet the high standard for overturning a factfinder's credibility determinations.

Apart from urging the Board to review its previous order and to consider objections presented for the first time at the hearing, the Employer attacks the Hearing Officer's credibility determinations. It is well established that the Board and appellate courts apply extreme deference to a factfinder's credibility determinations. The Board only overturns these findings "in rare cases." *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001). Indeed, "we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544 (1950) (emphasis in the original); see also *Stretch-Tex*

Co., 118 NLRB 1359, 1361 (1957) (applying the same analysis to hearing officer reports). This is especially true when a factfinder has assessed a witness's demeanor in resolving a credibility dispute. *See, e.g., V & W Castings*, 231 NLRB 912, 913 (1977) (citing *Standard Dry Wall*, 91 NLRB at 544) ("It is our longstanding policy to attach great weight to the credibility findings of an Administrative Law Judge, insofar as they are based on demeanor."). The Board should apply this well-established deference to the Hearing Officer's credibility determinations and to the Regional Director's review of these findings.

1. Glenda White

The Hearing Officer correctly determined that the testimony of Employer witness Glenda White was not credible. White claimed that Ellis confronted her in the women's restroom, stating "I don't know why these stupid people don't want to vote for [the] Union," "[y]ou guys are going to lose your job, los[e] money" and then suddenly threatened "I will beat you bitch" and left. Tr. at 160: 19-25; 168: 2-8. According to White, she did not say anything before, during, or after Ellis's outburst. *Id.* at 160: 3-5. The Hearing Officer noted that White and Davis had been friends for years but stopped speaking in December 2019 due to an argument unrelated to the decertification effort. Hr. Off. Rep. at 11. (Ellis provided undisputed testimony on this point (Tr. at 392: 10-15)). The Hearing Officer also noted that White testified that she had reported this incident to then-General Manager Ken Kuczmanski and Human Resources Specialist Melanie Richards. Hr. Off. Rep. at 11; see also Tr. at 168: 18-22. Both Kuczmanski and Richards, testified but neither corroborated White's testimony. Hr. Off. Rep. at 11.

The Hearing Officer correctly discredited White based on his observation of her demeanor, the incongruency of her testimony, and the failure of Kuczmanski and Richards to corroborate her testimony. (*Id.* at 12). The Employer fails to establish that "the clear

preponderance of *all* the relevant evidence "requires the Board to overturn this well-reasoned credibility determination. *Standard Dry Wall,* 91 NLRB at 544 (emphasis in the original).

The Employer makes a number of baseless arguments in support of its assertion that the Hearing Officer's credibility determination was flawed. First, the Employer argues that White's testimony was "succinct and consistent, and unrefuted by Ellis." Er. Req. for Review at 21. This claim is untrue. Ellis testified that she never threatened or confronted White in the restroom, creating a credibility dispute that the Hearing Officer had to resolve. Tr. at 392: 22-24.

Second, the Employer offers its own assessment of White's demeanor, claiming that she "was a particularly credible witness," "her words were broken and quiet, and difficult to hear clearly," and that she had a "timid demeanor." Er. Req. for Review at 21, 22. The Employer offers no supporting evidence for its self-serving observation. The Hearing Officer came to a different conclusion, noting that White "appeared to be embellishing Ellis' conduct" and that "my impression was that she had some personal animosity towards Ellis that led to her embellishment." Hr. Off. Rep. at 12. The Hearing Officer's assessment of White's demeanor was supported by the record, as he noted: "this assessment was later confirmed when Ellis testified that she and White had a falling-out in December 2019 to which White did not testify." *Id.* at 12. Still, the Employer argues that "the Hearing Officer pulled from thin air his baseless and self-serving musing that White's testimony was 'embellished' or that she may have some personal 'animosity towards Ellis . . . There is absolutely no support in the record for that conclusion and the Hearing Officer cited nothing to substantiate that bald claim." Er. Req. for Review at 21. The Employer's argument is flatly contradicted by the record and the Hearing Officer's Report. As noted above, Ellis provided unrefuted testimony that she used to be friends with White but the two employees no longer spoke and the Hearing Officer relied on that testimony in assessing

White's demeanor. *See V & W Castings*, 231 NLRB at 913 (noting that the Board attaches "great weight" to credibility findings based on demeanor).

Third, the Employer makes much of White's testimony that she began carrying her cell phone to the restroom so she could record any future incidents with Ellis. Er. Req. for Review at 22. (Curiously, Davis testified that she did the exact same thing. (Tr. at 128: 13-17)). The Hearing Officer, however, discredited all of White's testimony that related to alleged objectionable conduct. Hr. Off. Rep. at 12. The Employer did not point to any additional evidence that would support overruling the Hearing Officer's credibility determination.

Fourth, the Employer claims that the Hearing Officer discredited White in part because she could not remember the exact date of the restroom confrontation. Er. Req. for Review at 22. But the Hearing Officer never mentions White's inability to recall the date in his Report. Hr. Off. Rep. at 12. This omission was simply not part of his analysis.

Fifth, and finally, the Employer argues that "[a] central, fatal flaw in the Hearing Officer's credibility determinations is the false premise that Company representatives ostensibly failed to investigate or take disciplinary actions in response to the various incidents of misconduct. This patent error is based on the misconception that Davis or White 'reported' the misconduct during the critical period." Er. Req. for Review at 18. In fact, White testified that she reported the restroom incident to Kuczmanski and Richards "after they happened." Tr. at 168: 18-22. Therefore, there is record evidence that White reported this incident within the critical period. Further, the Employer mischaracterizes the Hearing Officer's analysis. The issue is not *when* White reported the restroom incident. The issue is that White claimed she *did* report this incident but neither Kuczmanski nor Richards, who both testified, corroborated White, further calling her credibility into question. Hr. Off. Rep. at 12. (The fact that the Employer never

disciplined Ellis for allegedly threatening to "beat" a fellow employee further calls White's account into question.)

White also testified in support of an additional objection. White claimed that she saw Ellis enter the cafeteria on the day of the election with Allen Richardson, another bargaining-unit employee. According to White, Ellis "just started hitting" Richardson and said "you better vote for the Union, bitch." Tr. at 164: 1-2, 9-10. After the Employer's counsel asked White to "back up," she then claimed that Ellis "was pointing fingers in [Richardson's] face" and later testified on cross that Ellis did not touch Richardson but had "her finger close to his face." *Id.* at 164: 3-14; 171: 8-9. White also testified that Ellis then told Richardson, "that bitch Robin [Davis], she better be voting for the Union or I will beat that bitch." *Id.* at 165: 2-6. White claimed that she reported the incident to Kuczmanski and Richards that day. *Id.* at 171: 17-24.

The Hearing Officer did not find White's testimony credible, based on her demeanor, her conflicting testimony, the failure of Kuczmanski and Richards to corroborate White, and the Employer's failure to call Richardson as a witness to corroborate White. Again, the Employer fails to establish that "the clear preponderance of *all* the relevant evidence" requires the Regional Director to overturn this well-reasoned credibility determination. *Standard Dry Wall*, 91 NLRB at 544 (emphasis in the original).

Instead, the Employer relied on the following arguments. First, the Employer argues that White did not quickly change her story while testifying. Er. Req. for Review at 22. Unsurprisingly, the Employer provides no support for this argument, which is flatly contradicted by the record. White first claimed that Ellis "just started hitting" Richardson, only to change her testimony and state that Ellis pointed her finger in Richardson's face. Tr. at 164: 3-14; 171: 8-9). Tellingly, the Employer's offer of proof alleged that Ellis pointed her finger in Richardson's face

and included nothing about Ellis hitting Richardson. Bd. Ex. 1(b) at A(2). Second, the Employer argues that the Hearing Officer "had no logical basis to draw an adverse inference based on the Company's failure to call *former* unit employee Allen Richardson to testify." Er. Req. for Review at 22 (emphasis in the original). But the Hearing Officer explicitly did not draw an adverse inference against the Employer: "While I do not draw an adverse inference based on the Employer's failure to call Richardson since Richardson is a neutral witness, I do consider it a factor in determining that the Employer has failed to meet its burden of establishing that the alleged objectionable conduct occurred and that it had a tendency to interfere with the results of the election." Hr. Off. Rep. at 14. Similarly, the Employer argues that the Hearing Officer just as easily could have drawn an adverse inference against the Union for failing to call Richardson as a witness. But the Employer, not the Union, had the "heavy" burden of establishing that the Union's conduct interfered with employee free choice and thus an incentive to put on its best case. *Lockheed Martin Skunk Works*, 331 NLRB 852, 853 (2000). Third, and finally, the Employer claims that the Employer did question White about this incident "later that same day" and that "[t]here is no logical basis to discredit White's account of this incident based on an alleged failure to investigate or take action where the Company ***indisputably did both***." Er. Req. for Review at 18-19 (emphasis in the original). Parenthetically, there actually is no record evidence that the Employer spoke to White about this incident, but this omission is irrelevant to the analysis. The Employer mischaracterizes the Hearing Officer's point. The Hearing Officer rightly pointed out that neither Kuczmanski nor Richards corroborated White's testimony, even though White testified that she had reported the incident to both of them. Hr. Off. Rep. at 14. Further, the Hearing Officer also pointed out that the Employer never disciplined Ellis for this alleged incident, even though it disciplined her for a less severe incident that same day. *Id.* at 14.

This failure to discipline Ellis for supposedly threatening to "beat" Davis further calls White's credibility into question.

In short, the Hearing Officer's assessment of White's credibility was based on a careful analysis of her demeanor, the incongruence of her testimony, the contradictions in her testimony, and the failure of other witnesses to corroborate her testimony. *Compare Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011) (overturning ALJ's credibility determination when record documentary evidence contradicted witness's testimony and ALJ provided no explanation for why he credited the witness); *E.S. Sutton*, 336 NLRB at 407 (overturning ALJ's credibility determination when ALJ relied on testimony that she herself described as "not accurate" and "shifting" and when record documentary evidence contradicted that testimony); *Bralco Metals, Inc.*, 227 NLRB 973, 974 (1977) (overturning ALJ's credibility determination when witness's testimony was contradicted by evidence, including evidence the ALJ failed to disclose in his decision). This case bears no resemblance to the few cases in which the Board has overturned a factfinder's credibility resolutions.

2. Matthew Passwater

Passwater, the Petitioner, is the only witness who corroborated any part of White's testimony. Passwater claimed that White told him Ellis "caught her in the bathroom and was threatening me." Tr. at 225: 15-17. The Hearing Officer correctly discredited Passwater's corroborating testimony, noting that Passwater also claimed that Davis told him Ellis "just caught me in the bathroom and was threatening to kick my ass." *Id.* at 220: 10-14; 221: 9-11. Notably, Davis never testified that Ellis threatened to "kick her ass" and the Employer filed no such objection. In addition, neither White nor Davis testified that they ever told Passwater about the alleged restroom incidents, even though they both testified that they reported the encounters

to management. *Id.* at 128: 1-17; 145: 17-23; 168: 18-22. Finally, Passwater's testimony is suspect because he testified that he was "on a mission to get – do away with the Union," and, as a party, he was not sequestered, heard White's testimony, and testified after her. Tr. at 224: 17-20. Accordingly, the Hearing Officer found "Passwater's testimony in this regard to be embellished and unreliable" and "[did] not find Passwater to be a reliable corroborating witness." Hr. Off. Rep. at 12, fn. 13.

The Employer argues that the Hearing Officer erred, noting that the Hearing Officer credited Passwater's testimony regarding when the pre-petition "confrontation" with Ellis took place. Er. Req. for Review at 20. The Employer suggests that the Hearing Officer exhibited bias against Passwater: "That the Hearing Officer credited Passwater *only* on this one issue that supported his narrative is a powerful testament to the results-based character of the Report." *Id.* at 20 (emphasis in the original). Of course, it is perfectly appropriate for a factfinder to credit a witness's testimony in one respect and not another. *See* Hearing Officer's Guide at IX(L)(3) ("The hearing officer may evaluate the inherent probability of events in assessing consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. When assessing a witness's credibility, the hearing officer should keep in mind . . . that one does not have to discredit all of a witness's testimony." (citing *Universal Camera v. NLRB*, 340 U.S. 474 (1951)). Such a finding on its own is not an indication of bias. *Id.* Further, the Employer does not, and cannot, point to any evidence of supposed bias on the part of the Hearing Officer. Further, it makes sense that the Hearing Officer credited Passwater on the date of this interaction. Passwater was able to pinpoint that the exchange with Ellis occurred before he filed the petition, while Ellis provided "vague testimony about when the incident occurred." Hr. Off. Rep. at 6, fn.

7. In addition, the Employer itself stated in its Objections and its First Request for Review that this exchange occurred pre-petition. Bd. Ex. 1(b) at C(f); Bd. Ex. 1(d) at 6.

The Employer also argues that the Hearing Officer improperly discounted Passwater's testimony regarding dissemination of the Union's alleged misconduct. The Employer points to Passwater's testimony that "other employees expressed concerns to him that the Union knew they signed the Petition, and he specifically identified several of them by name." Er. Req. for Review at 19. Specifically, Passwater testified that employees "were concerned because they were under the assumption and I basically gave them the assumption that this was totally confidential and that I was not going to show it to anybody." (*Id.* at 209: 1-4). But this testimony does not establish dissemination of any misconduct. At most, this testimony simply shows that Passwater's "promise of confidentiality . . . had been broken." Hr. Off. Rep. at 7, fn. 8.

Further, the only employees that Passwater were Brad Nichter and White. Passwater claims that both employees told him that Ellis and Waldren confronted them about signing the petition. But Passwater only provided vague testimony that Nichter complained Ellis "called him out" for signing the petition. Tr. at 207: 9-15. Passwater explained that Nichter had a "grin on his face" and did not appear threatened or intimidated. *Id.* at 219: 7-22. The Employer did not present Nichter as a witness to corroborate this hearsay testimony. Further, Passwater did not provide any additional details about White's alleged complaint. And although the Employer did present White as a witness, she did not testify that Waldren confronted her or that she spoke to Passwater about this alleged confrontation. The Hearing Officer rightly discounted Passwater's vague, hearsay testimony.

Finally, the Employer argues that the Hearing Officer discounted Passwater's testimony that he overheard Labarbera's alleged statement and that another employee witnessed his

exchange with Ellis. But the Hearing Officer noted that both of these alleged incidents occurred pre-petition. He therefore determined that they were outside the scope of objections set for a hearing. It is illogical to insist that the Hearing Officer should have considered (hearsay) evidence that allegations not before the Hearing Officer were disseminated throughout the unit.

3. Robin Davis

Davis testified that on February 21, 2020, Ellis "just came over and started talking about how she wanted to punch Matt Passwater in the face." Tr. at 147: 7-8. Davis also claimed that Ellis said she could "give two fucks less" about anyone who signed the petition. *Id.* at 126: 17-23. According to Davis, the conversation lasted "just long enough for her to say what she had to say and then she walked off." *Id.* at 147: 19-21. Davis testified that she reported Ellis's comment to her supervisor and to an unidentified co-worker. *Id.* at 150: 13-19.

The Hearing Officer rightly discredited this testimony. He noted that Davis's demeanor was "evasive" when testifying about this incident. Hr. Off. Rep. at 10. He also noted that no witness corroborated Davis's testimony. *Id.*. The Employer did not call Davis's supervisor as a witness and Davis refused to identify her co-worker. *Id.*. Therefore, "the veracity of her testimony" was "untested." *Id.*.

The Employer faults the Hearing Officer for discrediting this testimony but offers little in the way of argument. The Employer claims that there is no evidence that Davis reported this incident within the critical period and claims, without citing to any supporting record evidence, that Davis did not report the incident until the morning of the election. Er. Req. for Review at 18. But *when* Davis reported the incident is irrelevant. The point is that Davis testified that she reported the incident to her supervisor, yet the Employer failed to call her supervisor to corroborate her testimony. *See* Hearing Officer's Guide at IX(C)(3) ("When a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably

disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.") (citing *Gregg Construction Co.*, 277 NLRB 1411 (1985)). The Employer also speculates that Davis was "understandably unwilling to reveal the name of" her co-worker and that she "reasonably feared putting a co-worker in the Union's cross hairs." Er. Req. for Review at 19. The Employer provides no support from the record for these assumptions. As the Hearing Officer correctly noted, "[t]he record further does not provide a reason for her refusal to identify the witness." Hr. Off. Rep. at 10; *see also* Tr. at 150: 5-12. Therefore, the Employer failed to call two witnesses who, according to Davis, could have corroborated her testimony.

The Employer also makes the following confusing argument: "Although he [the Hearing Officer] discredited Davis for *not* identifying employees, he did not apply that same standard to Passwater!" Er. Req. for Review at 20 (emphasis in the original). But the Hearing Officer provided reasoned explanations for rejecting both of their testimony. Davis claimed that she told a co-worker about Ellis's alleged threat to punch Passwater in the face. She would not identify this co-worker and the co-worker did not testify to corroborate her. The Hearing Officer relied on this lack of corroboration and Davis's evasive demeanor in rejecting this testimony. Hr. Off. Rep. at 9-10. Passwater did identify the employees who supposedly complained to him about the Union. But none of these employees testified to corroborate Passwater. Therefore, the Hearing Officer rightly rejected this Passwater's testimony as unsubstantiated hearsay. *Id.* at 7-8, fn. 8; 8, fn. 10.

C. The Employer failed to demonstrate that the Hearing Officer and Regional Director misapplied the *Taylor Wharton* analysis.

In addition to attacking the Hearing Officer's credibility determinations, the Employer argues that Hearing Officer and the Regional Director misapplied the *Taylor Wharton* test in

three ways: 1) they ignored evidence of dissemination; 2) they failed to consider the cumulative effect of the Union's alleged misconduct; and 3) they cursorily applied the *Taylor Wharton* factors. Each argument fails and does not establish that the Hearing Officer or Regional Director departed from Board precedent or made an erroneous factual decision. NLRB Rules and Regulations, Section 102.67(d).

First, the Employer argues that the Hearing Officer should have considered the alleged dissemination of conduct that he determined did not happen or that occurred outside of the critical period. For example, the Employer faults the Hearing Officer for failing to find that Ellis's alleged confrontation with Richardson was disseminated throughout the unit because White testified that she witnessed their interaction. Er. Req. for Review at 20. But the Hearing Officer found that this confrontation never happened. Similarly, the Employer claims that the Hearing Officer failed to acknowledge Davis's testimony that she told another employee about Ellis's alleged threat to punch Passwater. *Id.* at 19. Again, the Hearing Officer determined that Ellis never made this threat. It is illogical to require the Hearing Officer to assess the dissemination of incidents he reasonably concluded did not actually take place. The Employer also argues that the Hearing Officer should have considered the dissemination of the Labarbera incident (allegedly Passwater overheard Labarbera) and the exchange between Passwater and Ellis (allegedly employee Wes Davis was present). *Id.* at 20. But the Regional Director and the Board expressly excluded both of these pre-petition incidents from the hearing. It is likewise illogical to require the Hearing Officer to assess the dissemination of incidents he was instructed to discount.

The Employer also argues that the Hearing Officer erred by discounting Davis and Passwater's testimony that other employees expressed concern that the Union knew they had

signed the petition. *Id.* at 19-20. As explained in the above section, the Hearing Officer rightly rejected this vague, unsubstantiated, and hearsay testimony. The Board should not grant review because the Hearing Officer declined to consider the dissemination of unsupported allegations from non-witness employees. Further, even if employees did express concern to Davis and Passwater, this fact does not establish that the misconduct alleged in the Employer's objections was disseminated throughout the unit. Rather, it simply shows that employees did not want the Union to know that they had signed the petition.

Second, the Employer claims that the Hearing Officer and Regional Director committed "manifest error" by failing to consider the cumulative effect of seven alleged incidents. Er. Req. for Review at 23-24). (The Employer includes six in its bullet pointed list and adds a seventh incident on page 24 of its Request for Review.) Again, the Regional Director and the Board found well before the hearing that three of these incidents should not be set for a hearing: the Laberbera allegation, the Passwater-Ellis exchange, and the Employer's theory that Ellis made a personal comment to Davis so that Waldren could accompany employee Edward "Slim" Bregenzer to the polls. Bd. Ex. 1(b); 1(e). Therefore, the Employer is faulting the Hearing Officer for failing to consider the cumulative effect of three incidents that he was expressly directed not to consider. This argument is non-sensical.

Relatedly, the Employer argues that the Hearing Officer failed to consider the cumulative effect of another rejected allegation: that Ellis told Davis she would punch Passwater in the face. The Hearing Officer considered this claim and rightly found that that Ellis never made this statement to Davis. Hr. Off. Rep. at 9-10. Therefore, the Employer is arguing that the Hearing Officer should have considered the cumulative effect of an allegation that the Hearing Officer determined did not take place. Again, this argument is illogical. *See Picoma Industries*, 296

NLRB 498, 500 (1989) (noting that a hearing officer must consider the cumulative effect of "*credited* testimony") (emphasis added).

That leaves only three incidents that the Hearing Officer determined actually took place and were relevant: Ellis asked Davis if she knew what she was doing when she signed the petition, Waldren told Davis that she thought Davis was not going to sign the petition, and Ellis called Davis a bitch in the restroom.[4] The Hearing Officer did consider the cumulative effect of these incidents and still determined that individually and in the aggregate, they did not warrant setting aside the results of the election. For example, the Hearing Officer analyzed Ellis's and Waldren's comments to Davis *together*, in the same section of his report. Hr. Off. Rep. at 8-9. The Hearing Officer found that the cumulative effect of these two minor statements was not objectionable. Further, while analyzing these two statements, the Hearing Officer noted "[e]ven when *considered in conjunction* with the other credible evidence discussed in objection (d) [the restroom incident between Ellis and Davis], I still reach the same conclusion." *Id.* at 8, fn. 9 (emphasis added). The Hearing Officer makes the same point when discussing the restroom incident: "Even when *considered in conjunction* with the other credible evidence discussed in objection (a) [the petition statements], I still reach the same conclusion." *Id.* at 13 and 13, fn. 15 (emphasis added). The Hearing Officer's Report clearly establishes that he considered the cumulative effect of relevant, credible allegations.

Further, the Regional Director directly addressed the Employer's argument that the Hearing Officer failed to analyze the cumulative effect of the Employer's offers of proof. She found that "[t]hese three statements *taken together* did not have the tendency to interfere with

[4] The Employer also argues that Ellis called Davis a bitch in the restroom "*on the same afternoon* that she was boisterous and disruptive during the Company meeting." Er. Req. for Review at 25 (emphasis in the original). The relevance of this argument is not clear. Ellis's behavior in the meeting is not the basis for any of the Employer's objections. Indeed, Ellis was likely engaged in protected activity during this meeting.

employee free choice . . . All three of the statements were made to a single employee and occurred approximately 2 weeks prior to the election, and there is no evidence of any renewal of the statements." RD Decision at 5 (emphasis added). The Regional Direct expressly analyzed the Union's alleged misconduct and determined that the credited allegations did not merit setting aside the election.

Third, the Employer claims that the Hearing Officer and Regional Director failed to "substantively analyze" the *Taylor Wharton* factors. Er. Req. for Review at 25. The Employer claims that the Hearing Officer simply concluded that "nearly all of these factors militate in favor of finding that the alleged conduct was not objectionable" but "provided no analysis for that conclusion." *Id.* at 28. The Employer cites to page 8 of the Hearing Officer's Report, in which the Hearing Officer discussed Ellis's and Waldren's comments to Davis about the petition. *Id.* at 28. But the Employer just points to one, introductory sentence of the Hearing Officer's analysis. The Hearing Officer goes on to carefully assess each *Taylor Wharton* factor, and does the same for each objection. Hr. Off Rep. at 8-9, 9-10, 12-13, 14-15. A simple skim of the Hearing Officer's Report demonstrates that his analysis was far from cursory.

The Employer ignores the Hearing Officer's careful analysis, but faults him for ignoring Davis's subjective reaction to Waldren's and Davis's questions about her signing the petition. Er. Req. for Review at 27. The analysis, however, is objective. It is not based on an employee's subjective reaction. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004). Viewed objectively, asking a friend at work if she knew what she was doing when she signed the petition is not objectionable. Similarly, stating surprise to a friend at work that she had signed the petition is also not objectionable. *See Teamsters, Local 705*, 347 NLRB at 443; *Kusan Mfg. Co.*, 267 NLRB 740, 745 (1983) (dismissing objection when union asked employees if they had signed

pro-union petition and acknowledging that union can engage in non-coercive polling). The Employer's cited cases are easily distinguishable. In *Baja's Place*, 268 NLRB 868, 868-869 (1984), the Board found a union representative's threats that he would "get" a non-supporter and "get" his job objectionable, especially given clear evidence that the non-supporter told multiple co-workers about the threats. Here, in contrast, neither Ellis nor Waldren threatened Davis with physical harm or economic retaliation and there is no evidence that their isolated statements were shared with anyone else. And in *Bellagio, LLC*, 359 NLRB 1116, 1118 (2013), a union agent threatened a non-supporter that if "this vote goes through, you're toast" and told him not to vote. The Board found this threat of reprisal objectionable, especially given clear evidence that the non-supporter shared the threat with other co-workers and the union agent made the threat two days before the election. Again, neither Ellis nor Waldren threatened or coerced Davis, there is no evidence that their isolated comments were shared with anyone else, and these interactions took place two weeks before the election.

The Employer also fails to add context to Davis's subjective reaction to these brief encounters. As the Hearing Officer noted, a few days after Ellis spoke to Davis about the petition, Davis confronted Ellis in the restroom. Hr. Off. Rep. at 9, fn. 11. This conduct suggests that Davis was not actually afraid of Ellis. *Id.* at 9, fn. 11. Regarding the exchange with Waldren, Davis herself testified that she only felt intimidated because "I felt it was my business what I was planning to do, and nobody needed to know." Tr. at 118: 23-24; *see also* 118: 3-7. In other words, Davis's was intimidated because she thought no one should know that she signed the petition, *not* because of anything Waldren said or did. *See id.* at 146: 5-9.

Finally, the Employer emphasizes the closeness of the election and cites three cases in support of its argument that election should be overturned. These cases are easily

distinguishable. In *Robert Orr-Sysco*, 338 NLRB 614, 615 (2002), the Board ordered a rerun election when the vote was close and the hearing officer found that the union made threats of physical violence, property damage, and deportation to six employees, and all of these employees relayed these threats to other employees. In *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995), the Board set aside the results of the election when a high-ranking management official interrogated an employee about his union sympathies, a supervisor threatened a union supporter with termination, and the employer disparately enforced the rules regarding distribution of literature. And in *Smithers Tire*, 308 NLRB 72, 72 (1992), a union official told an employee with a black eye "this is what happens when you cross us" and two other employees individually threatened to flatten their co-worker's tire and told her that "others would know how she voted." The circumstances in this case are markedly different than the clear threats and interrogation presented in the cases cited by the Employer.

Finally, the Employer makes the unsupported claim that "the fact the Union attained this majority with only eight Union members in the bargaining unit allows a reasonable inference some of the votes may have been improperly influenced. The closeness of the election, coupled with the union's minority status[5], provides reasonable bases for a rerun election." Er. Req. for Review at 27. The Employer provides zero evidentiary or legal support for this novel theory. The Union is not aware of any precedent that allows a factfinder to draw inferences or order a rerun election based on the number of members a union has. (This plant is based in Indiana, a right-to-work state. The results of the election just as likely indicate that the majority of employees are happy with the Union's representation but choose not to pay membership dues.)

D. The Hearing Officer and Regional Director correctly applied well-established precedent in finding that Tyler Adams was eligible to vote.

[5] Of course, a union's status is not based on the number of members it has but on the results of the election.

Finally, the Employer argues that the Hearing Officer and Regional Director erred in finding that employee Tyler Adams was eligible to vote. There is no dispute that Adams was employed as of the eligibility date, that the Employer did not challenge Adams's eligibility to vote, that Adams resigned after he voted but before the polls had closed, that the Employer paid Adams for 30 minutes on the day of the election, and that the Union did not know Adams would resign on the day of the election. The parties only dispute whether Adams actually performed any work on the day of the election. The Hearing Officer found the evidence inconclusive on this question. Hr. Off. Rep. at 15.

The Employer claims that this situation presents a "novel question of law." Er. Req. for Review at 5. In fact, the law is well settled in this area, demonstrated by the fact that the Hearing Officer and Regional Director cited Board and Supreme Court precedent when analyzing this objection. Hr. Off. Rep. at 15; RD Decision at 7. These cases hold that a party must challenge a voter's eligibility before the employees cast ballots, even if the party did not know that a voter's eligibility was in question. *Lakewood Engineering and Manufacturing Co.*, 341 NLRB 699, 700 (2004) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946)). The only exception is when the opposing party conceals the eligibility issue. *Id.* The Regional Director correctly found that "[t]here is no evidence demonstrating that the Union, Petitioner, or Employer knew that Adams would quit his employment after he voted on March 5, 2020." RD Decision at 7. Therefore, the Employer's objection must be overruled.

Still, the Employer argues that "Adams's vote must not be considered as he has no interest in the future of the Company or the bargaining unit." Er. Req. for Review at 30. This argument also fails. Long-standing precedent holds that an employee's interest in the employer or bargaining unit is immaterial. *See, e.g., Columbia Steel Casting Co., Inc.*, 288 NLRB 306

(1988) (noting that employee's "actual status on the date of the election [is] determinative," not employee's "subjective intent to terminate his retirement and attempt to return to work"); *Harold M. Pitman Co.*, 303 NLRB 655, 655 (1991) ("the Board has long held that an employee's intention to quit after the election does not affect his or her eligibility"); *Personal Products Corp.*, 114 NLRB 959 (1955) (overruling employer's challenge when employee gave notice of intent to quit prior to the election). Rather, it is well settled that "an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote. *Nichols House Nursing Home*, 332 NLRB 1428, 1429 (2000) (internal citations omitted). Adams was employed on the eligibility date. The Employer did not meet its burden of establishing that Adams was not working on the date of the election. Therefore, the Regional Director correctly found that Adams was eligible to vote. RD Decision at 7.

Finally, the Employer argues that the circumstances around Adams's resignation created a "projection of chaos" and "destroyed the laboratory conditions necessary for a free election." Er. Req. for Review at 27. As the Regional Director noted, the Employer raised this argument for the first time in its Exceptions to the Hearing Officer's Report. RD Decision at 7. But even if the Employer could assert a wholly new argument at this stage, there is absolutely no record evidence that any bargaining-unit employees overheard Adams. Even if they had, a third-party employee claiming that a supervisor is lying about an issue completely unrelated to the Union or the election is not conduct "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Robert Orr-Sysco*, 338 NLRB at 615 (internal quotations and citation omitted) (describing the standard for assessing third-party conduct). The Regional Director rightly rejected this argument.

IV. CONCLUSION

For the foregoing reasons, the Employer has not established that the Regional Director departed from Board precedent or made an erroneous factual decision. The Employer has also not established a compelling reason to revisit Board precedent. Therefore, its Request for Review must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed on February 23, 2021 via the Board's electronic filing system. A copy was also served via electronic mail upon the following individuals:

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